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No. 843

October Term 1941

IN THE

Supreme Court of the United States

EMILIANO BENAVIDES,

Petitioner,

v.

THE STATE OF TEXAS,

BRIEF OF THE STATE OF TEXAS

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FIRM FOUNDATION—AUSTIN

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To The Honorable, The United States Supreme Court:

STATEMENT OF THE CASE

The petitioner plead guilty to one of the most artrocious murders ever committed in Texas. The jury assessed his penalty at death. The Court of Criminal Appeals has in all things affirmed the judgment of the trial court.

The confession of the defendant, without any objection, was offered in evidence. Over repeated warning by the trial court of its consequence, the defendant plead guilty to the crime. By reason of the confession, the sheriff found the pistol with which the crime had been committed.

Petitioner in his application to this court assigns four separate reasons, as follows:

1. That he was inhumanly tortured to obtain a confession.

2. That he plead guilty under duress.

3. That he was forced to be tried by a prejudiced and biased jury.

4. That he was arrested in Mexico by an officer of the Mexican army and delivered across the border to Texas officers.

The respondent, State of Texas, submits that this court has no jurisdiction to hear and determine this cause, but if it does have such jurisdiction, there is no error in the record which would justify this court in reversing the judgment of the Court of Criminal Appeals in Texas.

Respondent presents the following Counter Points:

FIRST COUNTER POINT

Petitioner not having in any way objected to the admission of his confession in evidence, this court has no jurisdiction to review said question.

SECOND COUNTER POINT

Under Article 727 of the Code of Criminal Procedure in Texas, the confession of the petitioner was admissible in evidence, because as a result thereof the officers found the gun with which petitioner committed the crime.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER FIRST AND SECOND COUNTER POINTS

O. E. Conner, the sheriff who took the confession, stated that he took it in the jail at Mertzon, in Irion County, Texas, about September 20th; that same was freely and voluntarily made. The confession was offered in evidence without any objection on the part of respondent. (R. 85) In the confession respondent stated that he left the 30-30 gun with which he had killed the parties with Feliz Arispi. (R. 88)

The sheriff testified that after he obtained the con-

fession he and the respondent went to the residence of Feliz Arispi and found the gun. (R. 88-89)

Article 727 of the Code of Criminal Procedure in Texas provides:

> "The confession shall not be used * * * unless in connection with said confession, he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed."

At the time the confession was offered in evidence the petitioner had plead guilty to the crime. When the case was called for trial, petitioner had two able attorneys representing him. They were afforded opportunity to talk to and with petitioner.

There was not any suggestion prior to or at the trial of this case that the confession had been obtained by threats or duress or by any unfair methods. No exception was made to its introduction.

The only testimony that even remotely shows petitioner was mistreated prior to the time he made his confession is contained in his testimony on motion for new trial, wherein he stated, "They treated me pretty bad from the beginning. I was arrested in Mexico, and they put me in Texas soil. I was all beat up and treated cruelly." (R. 62) He did not testify, however, that Mr. Conner, the sheriff who took the

confession, was present at any time he claimed to have been mistreated, or that any of the parties who mistreated him was present when he made the confession.

In the motion for continuance respondent stated that his attorneys came to him on September 24th (which was a week before the cause was called for trial) and that he, the respondent, out of the presence of the officers talked to his attorneys; that they had an interpreter, and that "at that time defendant said he had signed a statement, but did not know what it contained; said he was guilty but did not want to be electrocuted." (R. 10)

THIRD COUNTER POINT

There was no evidence offered which even tended to show petitioner plead guilty under duress. The trial court did not abuse its discretion in refusing a new trial by reason thereof.

STATEMENT AND ARGUMENT

There is absolutely no evidence that petitioner plead guilty by reason of duress or threats of death by lynching.

The record shows that after the jury was impaneled petitioner was arraigned, the indictment

was read, and he plead guilty. (R. 37) One of his attorneys, Mr. Davenport, then asked the court to permit him to talk to the defendant. The court had the interpreter to carefully go over the matter, and the petitioner stated that he would like to talk to his lawyer, and the court permitted the petitioner to then talk to his two attorneys, W. E. Davenport and O. O. Franklin. (R. 38-39)

After petitioner had talked to his two lawyers he was again brought before the jury and the court asked him how he desired to plead to the indictment. Petitioner answered, "I am guilty." The court then instructed him that if he persisted in pleading guilty, the jury would be compelled to find him guilty and assess his punishment "at death or life imprisonment in the penitentiary; or, for any term of years confinement in the penitentiary not less than two." Petitioner insisted on pleading guilty and stated that he had not been advised to do so, and was doing it of his own free will. (R. 39)

This record shows that the trial court gave respondent every opportunity that the law could possibly afford, and gave him an opportunity to discuss his plea with both of his attorneys, and had the matter fully explained to him, both in English as well as in Spanish.

Respondent shows that there is nothing that shows the trial judge in any way was guilty of coercion, or that there was any threatened mob, or that there

was any reason whatever why a plea of guilty should not have been accepted.

FOURTH COUNTER POINT

There is nothing to show that petitioner was tried before a prejudiced or biased jury, and since he plead guilty to a most atrocious crime, there is nothing on which to base a conclusion that they rendered any judgment other than one that should have been rendered.

FIFTH COUNTER POINT

There is no evidence and nothing in the record to show that any Texas officer had anything to do with the petitioner's being arrested in Mexico, or illegally brought to Texas.

SIXTH COUNTER POINT

The Supreme Court of the United States has no jurisdiction to pass on any question that was not passed upon by the Court of Criminal Appeals of Texas. See:

Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U. S. 206:

Lynch v. New York, ex rel Pierson, 293 U. S. 52.

STATEMENT, ARGUMENT AND AUTHORITIES UNDER SIXTH COUNTER POINT

Petitioner presented only three bills of exceptions in the Court of Criminal Appeals in Texas; neither of these bills raise any Federal question.

By his first Bill of Exception (R. 36) he complained of the trial court's action in refusing to continue the cause.

Under Article 540 of the Code of Criminal Procedure in Texas, a trial may be continued upon written application of either the State or the defendant upon sufficient cause shown. Under the Texas decisions, it has always been held that it is within the discretion of the trial court to grant a continuance, and unless that discretion is abused, the appellate court will not reverse the judgment of the trial court. See:

Vernon's Annotations under Article 540 of the Code of Criminal Procedure in Texas.

This is purely a state matter, and no Federal question is raised.

By his Second Bill of Exception respondent com-

plains at the action of the trial court in requiring him to take some jurors which he thought were unfriendly. (R. 40) No question of race prejudice is involved, and no Federal question is raised by said Bill of Exception. In addition, as pointed out by the Court of Criminal Appeals, the petitioner having plead guilty, no possible error could have resulted from the selection of the jurors complained of. Further, under the holdings of our court, as revealed by the opinion rendered in this cause, the objection made to the jurors was and is not tenable.

The third and only other Bill of Exception is Number 3. (R. 57) This complains at the action of the trial court in refusing to grant petitioner's motion for a new trial.

The question of granting a defendant a new trial is, under Article 753 of the Code of Criminal Procedure of Texas, left to the discretion of the trial court, with the positive inhibition on the part of the Legislature that a new trial may be granted only for one or all of nine specific wrongs or reasons. In petitioner's Motion for New Trial he did not allege any of such statutory grounds or reasons. Nothing appears in the record to show that the trial court abused its discretion in deying the new trial; petitioner was in court and had two able lawyers to represent him; evidence to sustain a conviction was introduced without any objection; no complaint is made of the court's charge; no contention is made that the opinion was not the fair expression of the

opinion of the jurors; no contention that either of the jurors was guilty of any corrupt conduct; no claim that any witness failed to appear and testify, or that any witness was prevented from testifying; no claim that any new evidence has been discovered since the trial; everything contained in the Motion for New Trial was admittedly known several days before the cause was tried; no contention that the jury received any evidence after it retired to consider of its verdict; no misconduct of the jury is alleged; no contention that the verdict is contrary to either the law or to the evidence introduced at the trial of the cause.

In his petition filed in this court petitioner attempts to raise the question that he was wrongfully brought from Mexico into the United States. This question was not presented in the trial court; neither was it presented in the Court of Criminal Appeals, and that court has not passed upon that question.

Article 667 of the Code of Criminal Procedure of Texas provides:

> "The defendant, by himself or counsel, may tender his bill of exceptions to any decision, opinion, order or charge of the court or other proceedings in the case; and the judge shall sign such bill of exception under the rules prescribed in civil suits, in order that such decision, opinion, order or charge may be reviewed upon appeal."

The Court of Criminal Appeals in Texas has many times held, in construing the above article, that it could not and would not consider any error alleged to have been committed by the trial court unless same was preserved by a bill of exception.

In *Twitty* v. *State*, 34 S. W. (2) 875, the defendant was convicted of the offense of rape, and assessed the death penalty. After stating the substance of the testimony, the court used this language:

> "(1-3) We find in the record no exceptions to the court's charge. No bills of exception are brought forward. It appears that an issue was raised as to the voluntary character of the confession. Said issue was properly submitted to the jury in the charge of the court. It further appears that the issue of insanity was submitted in the charge. * * * In the state of the record, no question except the sufficiency of the evidence is presented for review. The fact that the jury assessed the extreme penalty has led us to make a most painstaking examination of the evidence. The opinion is expressed that the evidence is sufficient to support the conviction."

In *Sheffield* v. *State*, 37 S. W. (2) 1038, the Court of Criminal Appeals in Texas, in affirming the judgment of the trial court, used this language:

> "(1) In the brief filed for appellant we find many propositions advanced and questions suggested which are not raised by the bills of excep-

> tions. We are necessarily restricted to a consideration of points brought forward by the bills."

In *McFarlin* v. *State*, 55 S. W. (2) 844, the court, in affirming the judgment, used this language:

> "(1-2) We find in the record no bill of exception complaining of any proceeding in the trial court. * * * Other points are raised and discussed the first time in the well prepared brief filed by the attorney for appellant, but, in the absence of some complaint thereof in the trial court preserved by bills of exception, we are without power to consider these questions which are not fundamental in nature."

It is therefore apparent that in the case at bar the Court of Criminal Appeals in affirming the judgment of the trial court did not pass upon the question as to whether the petitioner had been wrongfully or illegally brought from Mexico into the United States. This matter was not in any way presented to the Court of Criminal Appeals for action or decision.

It is, we think, also equally true that the judgment of the trial court could be and was affirmed without the court's being required to pass upon the admissibility of the confession. There is no bill of exception in the record to the trial court's having admitted same in evidence. No objection was offered thereto. There was an abundance of evidence to support the judgment. By reason of the confession the sheriff located the gun with which the crime was com-

mitted. The shells found where the deceased had been killed were those used in the gun. In his motion for continuance he stated that he had told his lawyers that he was guilty of the crime.

Further, under Bill of Exception No. 3, the only question raised was as to whether the trial court abused his discretion in refusing to grant a new trial. This, as we have before stated, does not raise a Federal question.

Article 753 of the Code of Criminal Procedure in Texas provides that new trials in a felony cases shall be granted for the following causes, and no other, and names some nine different grounds for new trial. The motion for new trial filed by respondent in the case at bar did not and does not allege a single one of said statutory grounds as reasons for a new trial being granted.

In *Southwestern Bell Telephone Co.* v. *State of Oklahoma*, 303 U. S. 206, this court in refusing to review the action of the court of Oklahoma because no Federal question had been necessarily passed upon by the state court, used this language:

> ("Headnote 2.) We have repeatedly held that it is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its de-

> cision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could have been given without deciding it. (Cites a long list of authorities). Applying this rule the motion to dismiss must be granted."

In *Lynch* v. *New York, ex rel Pierson*, 293 U. S. 52, this court, in dismissing for want of jurisdiction a writ of certiorari, used this language:

> ("Headnote 3.) It is essential to the jurisdiction of this court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (Cites a number of authorities) Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of the federal question is sufficient in itself to sustain it, this court will not take jurisdiction." (Cites a number of authorities)

It is therefore the contention of the State of Texas that in this cause the petitioner has not shown any jurisdictional grounds why this writ should be grant-

ed, or why this court should interfere with the judgment of the court of last resort in Texas.

SEVENTH COUNTER POINT

Regardless of any state or federal question involved, the judgment of the Court of Criminal Appeals in Texas should be affirmed, under the record as presented.

STATEMENT, ARGUMENT AND AUTHORITIES

The record shows that Henry Calcote, his wife, mother and small daughter were murdered. The petitioner admitted that he killed all four of said parties. (R. 85) In his motion for a continuance he stated that he had admitted to his attorneys that he was guilty of said crime. (R. 10) In his confession he stated that the gun with which he had killed the parties was a 30-30 gun which he had taken from the home of Mr. Finnegan, and that he had left the gun at Feliz Arispi's. (R. 88) The sheriff found it at Feliz Arispi's. (R. 88) Julian Faba testified that on the night the parties were killed the petitioner came to his house and asked him to call Feliz Arispi and told Faba at the time that he, the petitioner, had killed a man. He testified that the petitioner at that time had a gun in his hand, and that he saw the petitioner give Feliz Arispi a gun. (R. 94)

Feliz Arispi stated that petitioner gave him the gun on the night the murder was committed. (R. 94)

When the petitioner was arraigned after the jury had been impaneled, he plead guilty. The court properly and fully warned him, and permitted him to talk to his lawyers, and had the matter fully explained to him by the interpreter, and after fully fully understanding what he was doing, the petitioner plead guilty to the crime. (R. 37-40)

There is not a line of testimony that suggests that the trial court who accepted the plea of guilty and who sentenced the petitioner was in any way prejudiced or biased, or that there was any undue influence brought to bear upon the petitioner to cause him to plead guilty. The trial court used every precaution and warned the petitioner of the result that might come by his pleading guilty. He plead guilty over the protest of his attorneys; he had testified or stated to his attorneys in their private conversation, with an interpreter of his own choosing, that he was guilty of the crime; that he did not want to be electrocuted. There is not in the record a single suggestion that anyone wrongfully caused the petitioner to plead guilty. It was his own free act, and it was only after the jury had given him the extreme penalty that he decided he would prefer not to plead guilty.

WHEREFORE, the State of Texas prays that this

cause be dismissed. In the alternative, it prays that the judgment of the Court of Criminal Appeals be in all things affirmed.

Respectfully submitted,

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